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No. 91-1406

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

On March 2, 1992, petitioner American Train Dispatchers Association [hereinafter, "ATDA"] filed a petition with this Court seeking a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to enable this Court to review *Southern Ry. v. ATDA*, 948 F.2d 887. The Railway Labor Executives' Association [hereinafter, "RLEA"] has obtained the written consent of the parties to present this brief as an *amicus curiae*,[1] and respectfully submits this brief in support of the petition.

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[1] The separate, written consents of petitioner and respondent Norfolk Southern Railway Company [hereinafter, "NSR"] have been submitted with this brief in accordance with Rule 37.2 of the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

Amicus RLEA is a voluntary, unincorporated association of the chief executive officers of thirteen labor organizations, including petitioner ATDA, that collectively represent the majority of rail employees in this country.[2] RLEA was formed in 1926 to act as the spokesperson for its members on matters of common concern before the Congress, the courts (including this Court) and administrative agencies that affect rail employees. Indeed, RLEA supported the amendments to the Railway Labor Act that are at issue in this case, and then acted as the spokesperson for rail labor in 1934 when Congress considered that proposed legislation—*i.e.*, the creation of the National Railroad Adjustment Board [hereinafter, "NRAB"] and the vesting of jurisdiction in the National Mediation Board [hereinafter, "NMB"] to decide "representation disputes." As such, RLEA has an interest in assuring that the jurisdiction which the 1934 amendments to the Railway Labor Act gave to the NRAB and to the NMB are construed properly.

This case presents two issues that RLEA considers important to the orderly functioning of the Railway Labor Act. First, there is the threshold jurisdictional issue, whether the lower courts properly derailed the Act's minor dispute resolution processes in this case by enjoining petitioner ATDA from exercising its right under Section 3 First(i) of the Act, 45 U.S.C. § 153 First(i), to have the NRAB resolve a dispute that the ATDA claimed involved the interpretation of an agreement. This issue, *amicus* RLEA respectfully submits, turns on whether the court of appeals was correct in asserting that the rationale of *Leedom v. Kyne*, 358 U.S. 184 (1958), justified the district court's exercise of jurisdiction over the carrier's claim that the NRAB lacked

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[2] A list of RLEA's affiliated labor organizations is reproduced herein as Appendix A.

jurisdiction to consider the union's contract-interpretation claim. According to the appellate court, *Leedom* supported the district court's exercise of jurisdiction *before* the NRAB had the opportunity to consider its own jurisdiction, thereby bypassing the exclusive jurisdiction of the NRAB to resolve contract interpretation issues and the judicial review process established by Sections 3 First(p) and 3 First(q) of the Act, 45 U.S.C. §§ 153 First(p) and 153 First(q), to consider whether the NRAB has exceeded its jurisdiction. Prior decisions of this Court, *e.g.*, *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), and this Court's recent decision in *Board of Governors v. MCorp Financial, Inc.*, Nos. 90-913 and 90-914, decided December 3, 1991, establish that the lower courts erred in usurping the NRAB's jurisdiction. The second issue, which is fairly included in the question presented by the petition, is whether the lower courts were correct in concluding that the underlying controversy posed by the ATDA's submission to the NRAB raised a "representation dispute," rather than a contract interpretation issue as the ATDA maintains.

Amicus RLEA respectfully submits that both issues are important to rail labor because they involve the very practical problem of whether a carrier can rely upon the right that the Railway Labor Act gives *its employees* to select *their* representative, to refuse to resolve a dispute over whether that carrier has entered into a contract that gives the employees covered by that agreement the right to perform the disputed work. These controversies, which are currently called "jurisdictional" or "scope" disputes, are a form of dispute that has been around for years; they are common today and, indeed, were common in 1934 when the Act was amended as rail labor had requested. It is important to rail labor, the carriers and to the public that there be a mechanism in the Act to resolve the merits of these disputes, and until recently there was such a mechanism—the adjust-

ment boards. *E.g., Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966). To change this by relegating the union to an administrative tribunal—the NMB—that has no ability to resolve the underlying controversy, does not foster one of the stated purposes of the Act—*i.e.*, "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5). Rather, it leaves the party asserting what are actually *contractual* rights without a meaningful and adequate means of vindicating those rights.

This case is an excellent example of this distortion of the Act's processes, for the lower courts have effectively left the ATDA without any method to resolve its claim that the work being performed by the NSR's "Superintendents, Transportation-Locomotive" [hereinafter, "STL"] was train dispatcher work that the carrier was obligated by contract to classify as dispatcher's work. Pet. App. at 17a-18a. Petitioner ATDA relied upon a contract that the carrier and our nation's major railroads had entered into with petitioner in 1937—*i.e.*, the "37/79" agreement—that gave the employees a right to have a "Joint Committee" (an adjustment board under Section 3 Second of the Act) investigate and resolve petitioner's claim that the carrier had improperly classified the disputed positions. Pet. App. at 18a. When the carrier objected to the submission of the union's classification claim to the Joint Committee because, the carrier asserted, STLs were not dispatchers and the 37/79 agreement applied only to the working conditions of "dispatchers" (Pet. App. at 19a), the ATDA invoked the jurisdiction of the NRAB to resolve the dispute raised by the carrier's interpretation of the 37/79 agreement as justifying its refusal to submit the classification dispute to the Joint Committee. *Id.* In other words, the union asked the

NRAB to decide whether the carrier was correct in construing the 37/79 agreement as not applying to the classification dispute.

Rather than defend its interpretation of the 37/79 agreement or challenge before the NRAB that tribunal's jurisdiction to resolve the dispute as presented to it by the ATDA, the carrier filed a suit in the United States District Court for the District of South Carolina. That suit sought an injunction to prevent the union from presenting its claim to the NRAB because, the carrier argued, the dispute, which the union claimed was a contract interpretation issue, was actually a dispute over whether the dispatchers represented the STLs—a "representation dispute" within the exclusive jurisdiction of the NMB under Section 2 Ninth of the Act, 45 U.S.C. § 152 Ninth. The district court concluded that it had jurisdiction to consider the carrier's challenge to the NRAB's jurisdiction and issued an injunction directing the ATDA to withdraw its dispute from the NRAB. Pet. App. at 28a-29a. That injunction was affirmed on appeal. Since there is no dispute among the carrier's employees as to whether the ATDA represents the craft or class of dispatchers on this carrier,[3] there is no dispute over which the NMB has jurisdiction under Section 2 Ninth, and there is, thus, no means within the ATDA's control to resolve the classification dispute.

Since RLEA's members are the individuals charged with the responsibility under the Railway Labor Act "to exert every reasonable effort . . . to settle all disputes, whether arising out of the application of . . . agreements or otherwise" (45 U.S.C. § 152 First), RLEA has a

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[3] Section 1206.2(a) of the NMB's regulations for the handling of representation disputes, 29 C.F.R. § 1206.2(a), provides that when a craft of employees are represented, a representation dispute will not be found by the NMB unless the applicant supports a representation application with "authorization cards" from "at least a majority of the craft or class . . . ."

very real and vital interest in assuring that the Act is properly construed so as to enable its members to settle jurisdictional disputes. It is for this reason that RLEA is submitting this brief in support of the petition.

SUMMARY OF ARGUMENT

This case presents important issues concerning the proper interpretation of the Railway Labor Act's dispute resolution processes that have been decided by the Fourth Circuit in a way that is in conflict with decisions of this Court in *Board of Governors v. MCorp Financial, Inc.*, Nos. 90-913 and 90-914, decided December 3, 1991, and *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955). In particular, the court of appeals has authorized the district courts to exercise jurisdiction over a suit by a railroad seeking to enjoin a union from invoking the jurisdiction of the NRAB under Section 3 First(i) of the Railway Labor Act to resolve a dispute that the union claims involves the interpretation and application of a collective bargaining agreement. This extraordinary relief was given to respondent because the lower courts, after considering the merits of the railroad's claim, concluded that the underlying controversy was a "representation dispute" within the exclusive jurisdiction of the NMB and outside the jurisdiction of the NRAB.

Amicus RLEA respectfully submits that this case presents important issues of federal law because the lower courts have interfered with the orderly and prompt resolution of a claim that an agreement subject to the Railway Labor Act gives one party to the dispute certain rights that the other party refuses to acknowledge. Congress, as this Court has noted many times before, "considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). But, according to the courts below, the federal courts can nevertheless intervene to disable a union

from using the adjustment board's processes if the carrier, relying on the rights of its employees under Section 2 Ninth, 45 U.S.C. § 152 Ninth, alleges that the underlying dispute may deprive unrepresented employees of their jobs because the NRAB may conclude that the carrier has agreed to give that work to represented employees. Such a dispute, the lower courts concluded, raises a "representation" dispute within the exclusive jurisdiction of the NMB under Section 2 Ninth. This ruling and similar ones by other courts of appeals expanding the scope of disputes subject to the NMB's jurisdiction, has the potential of emasculating the adjustment boards' exclusive jurisdiction to resolve contract based "jurisdictional/scope" disputes. Such a result would be contrary to earlier decisions of this Court, for this Court has previously recognized that the NRAB has the exclusive jurisdiction to decide contract based "jurisdictional" disputes. *E.g.*, *Transportation-Communications Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

Moreover, the court of appeals ruling giving the district courts the power to enjoin NRAB proceedings, *amicus* RLEA submits, is contrary to *Whitehouse* and *MCorp* because *Whitehouse*, when read in light of Sections 1 and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 107, shows that federal courts lack jurisdiction to interfere with the NAB's consideration of claims submitted to it. *Whitehouse* held that it is pure speculation to claim that a potential, but as yet unknown, NRAB ruling will harm the complainant, and that the Act's provisions for judicial review of an adverse NRAB decision eliminates any claim that such speculative harm will be irreparable. Nevertheless, the appellate court affirmed the injunction directing petitioner ATDA to withdraw its claim from the NRAB because the court of appeals concluded that this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), justified immediate judicial intervention to prevent the NRAB from exceeding its jurisdiction. The lower court's reliance on *Leedom v. Kyne* is, as this

Court's recent decision in *MCorp* shows, misplaced for there is no need to ignore Congress' carefully crafted scheme for the resolution of minor disputes, which provides for the judicial review of NRAB orders but only after the NRAB has exercised whatever jurisdiction Section 3 First(i) of the Act gives it to consider claims submitted to it. Since *McCorp* was decided approximately one month after the court of appeals issued its decision in this case, this Court should grant the petition, summarily reverse the court of appeals ruling and remand this case to that court for reconsideration in light of *MCorp.*

ARGUMENT

I. THIS CASE PRESENTS ISSUES THAT ARE IMPORTANT TO THE ORDERLY AND PROPER ADMINISTRATION OF THE RAILWAY LABOR ACT'S MINOR DISPUTE RESOLUTION PROCESSES

When Congress amended the Railway Labor Act in 1934 to correct some of the defects that had been detected in the 1926 Act, 44 Stat. 577 (1926), it established quasi-judicial, administrative tribunals to consider and decide at the request of either party to the dispute, any unresolved dispute "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or wording conditions" that has been handled on the property "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes . . . ." 45 U.S.C. § 153 First(i). Congress gave those tribunals—the NRAB and adjustment boards established under Section 3 Second of the Act, 45 U.S.C. § 153 Second—exclusive jurisdiction over the unresolved contract interpretation disputes—*i.e.*, "minor disputes." *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 304 (1989); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). As this Court explained in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added):

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing *effective and efficient remedies* for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. . . . The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. . . . Congress considered it *essential* to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.

Federal courts are not entirely removed from the Act's minor dispute resolution processes, however, for Congress provided the district courts with jurisdiction to review the *final* actions of the adjustment boards upon petition by a party to the dispute. 28 U.S.C. § 1337(a), 45 U.S.C. §§ 153 First(p) and 153 First(q). That review is not *de novo*, but rather is limited to three specific grounds for having the Board's action set aside: (1) failure of the Board "to comply with the requirements of this Act[;]" (2) "failure of the [Board's] order to conform, or confine itself, to matters within the scope of the [Board's] . . . jurisdiction[;]" and (3) "for fraud or corruption by a member of the [Board] . . . making the order." 45 U.S.C. § 153 First(q). *See, Union Pacific R.R. v. Sheehan*, 439 U.S. at 93-95. Until the adjustment board acts, however, federal courts do not have jurisdiction to prevent the board from exercising its jurisdiction. *E.g., Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955); 29 U.S.C. §§ 101, 107.

At the same time that Congress provided for the compulsory arbitration of minor disputes, it addressed a problem that rail labor had experienced under the 1926 Act in enforcing the principle in that Act that employees shall have the "complete" freedom of association to select their collective bargaining representative free from car-

rier interference. *See, Hearings on H.R. 7650, Before House Committee On Interstate And Foreign Commerce*, 73rd Cong., 2d Sess. at 78-80 (1934). Part of the remedy that rail labor sought from Congress in 1934 was a method to determine who the majority of a craft or class of employees had in fact selected as the representative of that craft or class. Along with Commissioner Joseph B. Eastman,[4] rail labor urged Congress to give that authority to the Mediation Board. Congress accepted that request and charged the NMB with the responsibility, "upon request of either party to the dispute," to investigate a dispute "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act . . . ." 45 U.S.C. § 152 Ninth.

While the NMB has the authority under Section 2 Ninth to determine which employees may participate in the selection of the craft's representative, the Board's role under that statute "is more the function of a referee." *Switchmen's Union v. NMB*, 320 U.S. 297, 304 (1943). As this Court observed in *Switchmen's Union*, the NMB makes no "order" under Section 2 Ninth. *Id.* "Under this Act Congress did not give the Board discretion to take or withhold action, to grant or to deny relief. It gave it no enforcement functions. It was to find the fact and then cease." 320 U.S. at 305. That finding of fact is unreviewable by the courts. *Id.* Again, as this Court observed in *Switchmen's Union*, 320 U.S. at 306:

> When Congress in § 3 and in § 9 [of the Act, 45 U.S.C. §§ 153, 159] provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And

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[4] Commissioner Eastman was a member of the Interstate Commerce Commission and the Federal Railroad Coordinator. This Court has recognized that Commissioner Eastman was "one of the weightiest voices before Congress on railroad matters . . . ." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954).

> the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality it denied administrative action under the other sections of the Act.

Generally, there is no problem in distinguishing between a dispute arising out of the interpretation or application of a contract and a dispute among employees as to who is there duly designated collective bargaining representative. However, the line of demarcation between these disputes is less clear when jurisdictional/scope disputes are involved. *See, Hearings on H.R. 7650* at 57-59, 79-80. But again, there should be no confusion because, if the underlying dispute is one over whether certain employees may participate in the vote to select the representative of the craft, the statute makes it clear that the NMB is to make that determination. 45 U.S.C. § 152 Ninth. That jurisdiction lies with the NMB even if one of the parties to such a dispute relies upon a contract to assert a right to have certain employees included in the craft for voting purposes. *See, In re Chicago & North Western Ry.—Yardmen and Switchmen*, 1 N.M.B. Det. 130 (1938). On the other hand, if the underlying dispute is whether the *contract* between the carrier and the collective bargaining representative requires the carrier to assign certain *work* to employees covered by that agreement, then the dispute is one involving the interpretation of an agreement and is within the exclusive jurisdiction of the adjustment boards. *E.g., Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966); *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950); *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946); *In re Chicago & North Western Ry.—Yardmen & Switchmen*, 1 N.M.B. Det. at 135-38. The true nature of the dispute, and not clever lawyering, should determine whether the NRAB or the NMB has jurisdiction over the controversy.

As this case exemplifies, it is important to the orderly administration of the Act that jurisdiction/scope disputes arising out of the interpretation of agreements not be shunted off to an agency that has no power to consider the underlying controversy, for the end result in such a situation will be that the dispute remains unresolved and simply festers. Unfortunately, however, this case does not stand alone, for in recent years carriers subject to the Act, both railroads and airlines, have asserted that contractual jurisdictional disputes are within the jurisdiction of the NMB because the employees who might be affected by an adverse interpretation of the contract "should be allowed the opportunity to determine whether they want to be represented by the union." Pet. App. at 10a. That argument was accepted here, even though, *amicus* RLEA submits, the carriers do not have standing to raise the representational rights of their employees;[5] it has also been accepted by several other courts. *Compare, ALPA v. Texas International Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), *with, ALPA v. Transamerica Airlines, Inc.*, 817 F.2d 510 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987). Although some courts have recognized that carriers often paint with too broad a brush when they raise the "representation dispute" claim, *AFA v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), other courts have allowed the carriers to expand that concept to include far more than disputes "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act . . . ." 45 U.S.C. § 152 Ninth. *See, RLEA v. Wheeling & Lake Erie Ry.*, 914 F.2d 53 (4th Cir. 1990).

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[5] As this Court has noted before: "To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end [of industrial peace], it is inimical to it." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), *quoted in Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 50 n.16 (1987).

Amicus RLEA respectfully submits that the proper interpretation of "representation" disputes is too important to the orderly administration of the Railway Labor Act to leave in doubt. Indeed, employees and carriers must know whether Congress intended contractual rights to be unenforceable as "representation disputes," for there is no sense in entering into a contract and giving up certain rights in exchange for the new ones if the new rights are not capable of being enforced.

Moreover, the rail industry must know whether the adjustment board process may be sidetracked as occurred in this case. Rail labor agreed to forego its right to exercise self-help over minor disputes in exchange for the NRAB with its promise of a quick, orderly and binding resolution of minor disputes. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). Congress intended that agency to provide such a remedy, and, as this Court stated in *Union Pacific R.R. v. Sheehan*, 439 U.S. at 94, it "considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." However, according to the lower courts in this case, there is an exception to Congress' carefully crafted scheme that permits a court to *enjoin* one party to a dispute from invoking the NRAB's jurisdiction. This Court has in the past refused to permit such an interference with the orderly functioning of the Act (*see, Whitehouse v. Illinois Central R.R., supra*) and it is clearly important to the rail industry to know if there is now an exception to that prohibition.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS DECISION SINCE THE APPELLATE COURT HAS DECIDED IMPORTANT ISSUES OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS BY THIS COURT INSTRUCTING FEDERAL COURTS NOT TO INTERFERE WITH THE ADJUSTMENT BOARD PROCESS

This Court has previously instructed the federal courts that they should not interfere with the adjustment board

processes, for Congress has given those boards exclusive jurisdiction over contract interpretation issues and has made the orders of those tribunals "final and binding," subject only to limited review in the federal courts. 45 U.S.C. §§ 153 First(m), (p) and (q). *See, Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950). Indeed, in *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955), this Court concluded that federal courts should not intrude into the adjustment board process and enjoin those procedeings because there can be no showing of irreparable harm. This is so because Congress has provided for judicial review of such agency action *after* the administrative process is concluded and it is speculative to assume that the movant will even need to seek such review. 349 U.S. at 373-74. That ruling, *amicus* RLEA submits, means that federal courts lack jurisdiction to enjoin a party from invoking the NRAB's jurisdiction since Sections 1 and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 107, deprive federal courts of jurisdiction to issue injunctions in labor disputes where, as here, the complainant can not show that it will be harmed irreparably if the injunction is not issued.

Nevertheless, in this case the appellate court affirmed the injunction that required the ATDA to withdraw its claim before the NRAB, because the court of appeals concluded that this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), justified judicial intervention where the administrative agency "would be exceeding its statutory authority in considering the Union's claim." Pet. App. at 12a. That decision by the court of appeals was made more than a month before this Court decided *Board of Governors v. MCorp Financial, Inc.*, Nos. 90-913 and 90-914, decided December 3, 1991, which rejected an analogous, expansive reading of *Leedom v. Kyne*.

In *MCorp* this Court explained that "central to our decision in *Kyne* was the fact that the Board's [*i.e.*, the NLRB] interpretation of the Act would *wholly* deprive the union of a meaningful and adequate means of vindi-

cating its statutory rights." 60 U.S.L.W. at 4008 (emphasis added). This Court also stated in *MCorp* that another reason why *Kyne* should not be read expansively was the fact that *Kyne* "stands for the familiar proposition that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'" *Id.* at 4008-09, *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

MCorp, *amicus* RLEA respectfully submits, shows that the Fourth Circuit's reading of *Kyne* is incorrect. First, the Railway Labor Act gives a party to an NRAB proceeding the right to seek judicial review once that proceeding has been concluded *if* that party believes it has been injured by an act of that Board in excess of its jurisdiction. Thus, premature judicial review under *Kyne* is not necessary to vindicate respondent's statutory rights since those rights are protected by Sections 153 First(p) and (q). And second, since this Court has previously concluded that judicial review of NRAB actions should not occur until *after* the Board has acted, *e.g.*, *Whitehouse*, 349 U.S. at 373-74, and Congress did not disturb that ruling when it amended the Act in 1966, modifying the manner in which NRAB orders could be reviewed by the federal courts (Pub. L. No. 89-456, 80 Stat. 208, 209 (1966)), it is clear that Congress did not intend to give the federal courts jurisdiction to enjoin NRAB proceedings, notwithstanding Section 7 of the Norris-LaGuardia Act.

Since the court of appeals did not have the benefit of this Court's decision in *MCorp* before it issued its decision in this case, *amicus* RLEA respectfully submits that this Court should grant the petition, summarily vacate the judgment of the court of appeals and remand with instructions to reconsider in light of *MCorp*.

III. THIS COURT SHOULD REVIEW THE COURT OF APPEALS DECISION SINCE THE APPELLATE COURT HAS IGNORED EARLIER DECISIONS BY THIS COURT SHOWING THAT CONTRACTUALLY BASED JURISDICTIONAL CLAIMS ARE DISPUTES WITHIN THE EXCLUSIVE JURISDICTION OF THE NRAB

As *amicus* RLEA has shown above, the court of appeals has decided important issues of federal law concerning the distinction between "representation" and "minor" disputes that impermissibly narrowed the scope of disputes that employees may present to the Act's adjustment boards. Instead, the courts below have relegated rail labor to the NMB, an administrative agency that has no jurisdiction to interpret the collective bargaining agreement that petitioner ATDA asserts gives it the right to have the disputed *work* investigated and properly classified. Moreover, since there is no dispute among the dispatchers as to who represents them, there is no dispute over which the NMB may exercise jurisdiction under Section 2 Ninth of the Act. In short, the courts below have relegated the union's contract based claim to a forum which has no power to resolve it.

This treatment of "jurisdictional/scope" disputes, which are based on a claimed contractual right and do not involve the question of who represents the craft or class, is, as *amicus* noted above, inconsistent with the earlier decisions of this Court in *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966); *Whitehouse v. Illinois Central R.R., supra; Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239 (1950); and *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946), for each of those cases involved jurisdictional/scope disputes that were considered to be within the exclusive jurisdiction of the NRAB. The only distinction between the ATDA's underlying claim in this case and the claims at issue in the above cases, is that here the employees who are performing the work that the ATDA claims is its work are unrepresented, while in

each of the above cases another union was involved. That distinction, however, should have no bearing on the proper classification of this dispute as being within the NRAB's or NMB's jurisdiction.

If this Court does not summarily reverse because of *MCorp*, it should nevertheless review the ruling below because of the manner in which the court of appeals' decision is inconsistent with *Pitney* and its progeny.

CONCLUSION

Amicus RLEA submits that the petition should be granted.

Respectfully submitted,

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APPENDIX A

Organizations Whose Chief Executive Officers
Are Railway Labor Executives' Association Members

American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Hotel Employees and Restaurant Employees
International Union;
International Brotherhood of Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Seafarers International Union of North America;
Sheet Metal Workers' International Association; and
United Transportation Union.